# APPENDIX "A"

IN THE

## UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959—SEPTEMBER SESSION, 1959.

No. 12669.
COLUMBIA BROADCASTING SYSTEM, INC.,
*Plaintiff-Appellee,*
v.
AMANA REFRIGERATION, INC.,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 20, 1959

HASTINGS, *Chief Judge*, PARKINSON and CASTLE, *Circuit Judges*, delivered the opinion of the court:

CASTLE, *Circuit Judge*. Columbia Broadcasting System, Inc., plaintiff-appellee (CBS) brought a diversity action against Amana Refrigeration, Inc., (Amana) for $284,545.21 alleged to be due under agreements for the production and broadcasting of a television program by CBS under Amana's sponsorship over certain broadcasting stations affiliated with the CBS television network. Amana's answer contained a counterclaim setting forth three alleged anti-trust law violations by CBS in connection with the transactions upon which the action brought by CBS was predicated. The counterclaim charged that Amana was damaged by alleged action of CBS (1) granting greater

discounts to favored advertisers, competitors of Amana, in violation of 15 U.S.C.A. §13 (a), (2) requiring as a condition of the broadcasts that Amana agree to sponsor the program over a specific group of television stations designated by CBS in violation of 15 U.S.C.A. §1 and §14, and (3) requiring as a condition of the broadcasts that Amana agree to sponsor a program in which CBS had a financial interest in violation of 15 U.S.C.A. §1 and §14. Treble damages were sought.

CBS moved to dismiss the first of the three parts of the counterclaim on the ground that 15 U.S.C.A. §13 (a) was inapplicable. It filed a reply to the balance of the counterclaim. The District Court found for CBS on its motion to dismiss and entered an order of dismissal as to the "first cause of action of the counterclaim". Thereafter, Amana applied to the District Court for a certification pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, declaring that there is "no just reason for delay" and moving the court to direct the entry of "final judgment". The District Court granted Amana's application for certification over the objection of CBS. Amana filed its notice of appeal from the order of dismissal. CBS filed a motion to dismiss the appeal on the grounds that the order below was not a final order and that the requirement of Rule 54 (b) that there be no just reason for delay is not satisfied. The motion to dismiss the appeal was taken with the case.

The District Court's determination does not preclude review by us, *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427. Apart from consideration of the question of whether the part of the counterclaim dismissed constituted a "claim for relief" within the meaning of Rule 54 (b), it is our opinion that the District Court's determination that there was no just reason for delay was an abuse of discretion.

The question of whether there was a basis for the determination by the District Court that there is no just reason for delaying review of the dismissal of the portion of the counterclaim until after final judgment had been rendered on the claim of CBS and the other parts of Amana's counterclaim must be determined in the light of the traditional, deeply-rooted and wisely sanctioned principle against piecemeal appeals. Rule 54 (b) is designed to make an accommodation between that policy and the problems of the timing of review which have arisen under the liberalized joinder of claims, counterclaims, crossclaims and third party claims in one suit permitted by modern procedural rules. In this connection the following observations made in *Panichella* v. *Pennsylvania Railroad Company*, 3d Cir., 252 F. 2d 452 are pertinent:

> "Thus, the procedure contemplated by Rule 54 (b) is usually more than a formality. Perhaps it can properly be viewed as mere formality, albeit an essential prerequisite of immediate appeal, in those cases where it is clear that the disposition of a portion of the litigation has been such as would clearly have constituted an appealable final judgment under Section 1291 of Title 28 before the adoption of the Rules of Civil Procedure. But otherwise and ordinarily an application for a 54 (b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present. Indeed, the draftsmen of this Rule have made explicit their thought that it would serve only to authorize 'the exercise of a discretionary power to afford a remedy in the infrequent harsh case * * *.' 28 U.S.C.A., Federal Rules of Civil Procedure, 118-119 note. It follows that 54 (b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satis-

factory disposition of litigation in the light of the public policy indicated by statute and rule? See 6 Moore, Federal Practice, 1953, 264-65."

Evaluated by the above standard the instant case was clearly not an appropriate one for entering a special order under Rule 54 (b). The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal.

We conclude that the order entered under Rule 54 (b) did not constitute a proper exercise of discretion. It should be vacated so that the order dismissing the portion of the counterclaim may be restored to an interlocutory status which would permit a later appeal if occasion should arise upon final disposition of the cause.

This appeal is dismissed and the cause remanded to the District Court with directions to vacate the order entered under Rule 54 (b).

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No. 12669

HASTINGS, *Chief Judge*, dissenting: In the action below, Amana filed an answer to the complaint of CBS by way of a counterclaim alleging therein three separate causes of action, designated, respectively, as the First, Second and Third "Cause of Action." The First Cause of Action alleges a violation of Section 2 (a) of the Robinson-Patman Act, 15 U.S.C.A. 13 (a), predicated on an alleged price discrimination by CBS. The Second and Third Causes of Action allege a violation of both Section 3 of the Clayton

Act and Section 1 of the Sherman Act, 15 U.S.C.A. §§ 14 and 1, predicated, respectively, on two "tying" practices engaged in by CBS: (1) The "must buy" policy, whereby each sponsor, as a condition of purchasing any television time over the CBS network, must agree to purchase such time over a specified group of television stations and is thereby denied the opportunity of choosing those stations which he deems best suited to his marketing objectives; and (2) the policy of refusing to sell network time to a prospective sponsor unless such sponsor agrees to purchase a program in which CBS has a financial interest instead of an independently-owned program of the sponsor's own choice.

The district court sustained the motion of CBS to dismiss the First Cause of Action of the counterclaim on the ground that it failed to state a claim upon which relief could be granted, that is, that Section 2 (a) of the Robinson-Patman Act is not applicable to the television network services rendered by CBS to Amana. Or, as the district court stated in its order of dismissal, "* * * the word 'commodity' as therein [15 U.S.C.A. § 13 (a)] used relates only to articles of merchandise—goods, wares and merchandise—in short, anything having the attribute of tangible existence—and cannot be construed so as to include the concept of network television time."

Following dismissal of the First Cause of Action in its counterclaim, Amana elected not to amend and moved for entry of final judgment thereon. The district court found that such First Cause of Action constituted a claim for relief separate and distinct from the other two claims in the counterclaim; that its order of dismissal constituted a final decision dispositive of such claim; that "there is no just reason for delay;" and it entered final judgment dismissing the claim with prejudice, all over objection of

CBS. The certification by the district court was made pursuant to and in full compliance with the provisions of Rule 54 (b), Federal Rules of Civil Procedure, 28 U.S.C.A. On April 27, 1959, Amana filed a timely notice of appeal from the order of dismissal.

On June 9, 1959 CBS filed its motion to dismiss this appeal on the grounds: (1) that the order below is not a "final" order within the definition of 28 U.S.C.A. §1291 and Rule 54 (b) of the Federal Rules of Civil Procedure; and (2) that the requirement of Rule 54 (b) that there be no just reason for delay is not satisfied. On June 19, 1959, our court entered an order that the motion of CBS to dismiss this appeal be continued and taken with the case on its merits. Thereafter, the case was fully briefed on its merits by both parties and on September 24, 1959, was heard by this court both on the motion to dismiss the appeal and on the merits.

The majority is moved to dispose of this appeal by granting the motion of dismissal on the second ground thereof, holding that "the District Court's determination that there was no just reason for delay was an abuse of discretion." The majority did not pass upon the first ground asserted for dismissal, i.e., whether the First Cause of Action of the counterclaim constituted a "claim for relief" within the meaning of 28 U.S.C.A. §1291 and Rule 54 (b).

I find myself in disagreement with the disposition made of this appeal by the majority. In my judgment the claim dismissed was clearly a "claim for relief" within the meaning of Rule 54 (b); and its dismissal constituted a "final decision" on that claim pursuant to 28 U.S.C.A. §1291, under the recent holdings of the Supreme Court of the United States in *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956) and *Cold Metal Process Co.* v. *United Co.*, 351 U.S. 445 (1956).

This leads us then to a consideration of whether the district court was guilty of an abuse of discretion. Mr. Justice Burton, in *Sears, Roebuck*, at page 437, said:

> "* * * But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals."

I agree that in considering this problem we cannot lose sight "of the traditional, deeply-rooted and wisely sanctioned principle against piecemeal appeals." Applying the standard announced in *Panichella* v. *Pennsylvania Railroad Company*, 3d Cir., 252 F. 2d 452 (1958), the "infrequent harsh case" rule, the majority then concludes:

> "* * * The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal."

It is with this conclusion that I disagree. This case is now remanded to the district court for trial on the issues drawn on the plaintiff's principal claim for damages and defendant's remaining two claims under its counterclaim. On appeal from the result of that trial Amana may again challenge the merits of the dismissal of its first claim, as it attempted to do in the case at bar. If it is successful in

that effort, a reversal will send the case back again for a second trial with its attendant pre-trial proceedings and resulting additional delay and cost to Amana. The *possibility* of this occurrence can be avoided by the simple expedient of determining this appeal on its merits *now*.

It does not appear that real harm will result in the delay occasioned by the *disposition* of this appeal on its merits at this time. CBS admits that Amana paid $252,430.94 on its claim of $284,545.21 at the time of filing its answer, leaving the remaining disputed balance of $32,114.27 for trial on the complaint. It is shown that CBS has deferred taking depositions and requiring Amana to answer interrogatories until the conclusion of the motion to dismiss Amana's first claim.

Without in any sense indicating the disposition I would make of it, it is my judgment that a determination of this appeal on its merits at this time would serve to simplify and facilitate the conduct of the future litigation in this case, and that to fail to do so will result in hardship and unfairness to *both* parties. The case has been fully briefed and argued before us on the merits, and we will never be in better position to decide the important principal issue before us than we are at this time. To do so is to give effect to the plain import of the holding in *Sears, Roebuck & Co. v. Mackey, supra.*

I would hold that the district court did not abuse its discretion in entering its order under Rule 54 (b) and would deny the motion to dismiss this appeal and then proceed to determine the appeal on its merits at this time.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

# APPENDIX "B"

IN THE

## UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, October 20, 1959

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. W. LYNN PARKINSON, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

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| No. 12669.<br>COLUMBIA BROADCASTING SYSTEM, INC.,<br>*Plaintiff-Appellee,*<br>v.<br>AMANA REFRIGERATION, INC.,<br>*Defendant-Appellant.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this appeal from a judgment of the said District Court entered therein on March 31, 1959, in this cause appealed from be, and the same is hereby, DISMISSED, with costs, and that this cause be, and the same is hereby REMANDED to the said District Court with directions to vacate the order entered under Rule 54-(b), in accordance with the opinion of this Court filed this day.

# APPENDIX "C"

IN THE

## UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, November 24, 1959

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. W. LYNN PARKINSON, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

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| No. 12669.<br>COLUMBIA BROADCASTING SYSTEM, INC.,<br>*Plaintiff-Appellee,*<br>v.<br>AMANA REFRIGERATION, INC.,<br>*Defendant-Appellant.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

It is ordered by the Court that defendant-appellant's petition for rehearing in this cause be, and the same is hereby, DENIED.

## APPENDIX "D"

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13 (a):

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other places under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall

prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."